No. 347

IN THE

Supreme Court of the United States

..... TERM, 1945

F. H. McGRAW & COMPANY, INC.,
Plaintiff-Petitioner,

v.

JOHN T. D. BLACKBURN, INC., and MILCOR STEEL CO.,
Defendants-Respondents,

and

THE AETNA CASUALTY & SURETY COMPANY,
Third Party Defendant-Petitioner.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, F. H. MCGRAW & COMPANY, INC. and THE AETNA CASUALTY & SURETY COMPANY, respectfully pray for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit, entered on May 22, 1945, affirming a judgment entered by the United States District Court for the District of Connecticut in favor of the respondent, John T. D. Blackburn, Inc. against the petitioners, for the sum of $9,009.64, with interest and costs *(R., 619-620).

* (R.) with a numeral indicates a page reference to the transcript of the record in the Circuit Court of Appeals.

Summary Statement of Matters Involved

F. H. McGraw & Company, Inc., a New Jersey company engaged in business as a general contractor and builder in the State of Connecticut, received a contract from the State of Connecticut, on or about August 16, 1938, for the general construction of the Continued Treatment Units, Fairfield State Hospital, at Newtown, Connecticut (R., 109; 599). In connection therewith, and as required by Connnecticut Statute [§540d (r), Conn. General Statutes, Supp. 1937; §786e (r), Supp. 1939], it filed a surety bond, executed by itself as principal and The Aetna Casualty & Surety Company as surety (R., 110-112; 599-600). By the terms of the Statute, as well as of the instrument itself, the bond was to be held by the Connecticut Commissioner of Public Works for the use of each party who shall have "furnished materials or supplies or performed labor in the prosecution of the work * * *, and *who has not been paid therefor*" (§540d (r), Conn. Gen. Stat., Supp. 1937; §786e (r), Supp. 1939; R., 111; 600).

On or about September 1, 1938, McGraw entered into a written subcontract with the Sherman Plastering Co. Inc., a New York company, whereby the latter company undertook to perform certain work and furnish certain materials to McGraw's Newtown project (R., 109; 600-601). Sherman, which finished its contract on January 10, 1940 (149 Fed. (2), 301, * 303), purchased some supplies for that project from John T. D. Blackburn, Inc., also a New York company, from July 19, 1939 to January 9, 1940 (149 Fed. (2), 301, 304; R., 602). During that time, and between those dates, Sherman made substantial payments to Blackburn, having received from F. H. McGraw & Company, Inc., on account of its contract, the sum

* Reporting the opinions of the Circuit Court of Appeals herein.

of $77,195.76 prior to January 10, 1940 (149 Fed. (2), 301, 303; R., 313-314). The Trial Court found that the payments made by Sherman to Blackburn between July 19, 1939 and January 9, 1940 were made as payments on account of Sherman's indebtedness, without direction or instruction (Finding #20, R., 603). The Trial Court further found that Blackburn credited the payments which it received from Sherman on Sherman's running account of indebtedness "without making any allocation of any of said payments to any particular job" (Finding #21, R., 603). He also found that:

> "If the payments described in Paragraph 20 be deemed all applied against the earliest sales made by Blackburn to Sherman then unpaid, Sherman's indebtedness to Blackburn on account of material furnished for the Fairfield job* was fully paid and discharged" (Finding #22, R., 603-604).

and that:

> "There is no proof that prior to January 22, 1940, Blackburn manifested an intent to apply the several payments theretofore made by Sherman to Sherman's indebtedness of specific sales of material used elsewhere than in on account the Fairfield job * * *" (Finding #23, R., 604).

Sherman's other jobs, to which the Trial Court referred, were jobs which had nothing to do with McGraw or McGraw's Newtown project. They were all commenced *after* January 9, 1940, the date of Blackburn's last delivery of materials to the McGraw's Newtown job. It is undisputed that the only unpaid indebtedness which existed between Sherman and Blackburn *prior* to January 9, 1940, when the payments involved herein were received

*. The terms "Fairfield job" or "Fairfield project" and "Newtown job" or "Newtown project" have been used interchangeably in the opinions and briefs below.

by Blackburn from Sherman, was Sherman's indebtedness on the Newtown job (149 Fed. (2) at 308-309). Subsequent to January 9, 1940, Sherman started jobs at Coxsackie, New York; Dannemora, New York; Bedford Hills, New York; and Beacon, New York (R. 580, Exh. M-50; R. 552, Blackburn's Exh. 22). All of Blackburn's deliveries to those new jobs were made after January 9, 1940, the date of Blackburn's last delivery to the Newtown job. With the exception of two small deliveries made to Coxsackie on January 12, 1940 and January 19, 1940, everyone of Blackburn's deliveries to the Coxsackie, Dannemora, Bedford Hills and Beacon jobs was made *after* January 24, 1940 (R. 580, Exh. M-50; R. 552, Blackburn's Exh. 22), the date when Blackburn allegedly manifested an intent to re-apply the monies which it had received from Sherman between July 19, 1939 and January 9, 1940 to the jobs other than the Newtown job.

Upon the basis of Blackburn's alleged re-application of the payments received long before January 9, 1940, when the only existing indebtedness was the indebtedness on the Newtown job, to obligations incurred by Sherman long after January 9, 1940, on jobs which were not in existence or even contemplated when the payments were received, Blackburn filed a claim in the Connecticut District Court against the petitioners upon their bond, contending that, under the Connecticut statute, it was a party "who has not been paid" for its Newtown deliveries. The initial proceedings had been commenced by McGraw under the Federal Interpleader Act, 28 U.S.C.A. 41 (26), against Sherman's claimants, including Blackburn, the basis of jurisdiction being the diversity of citizenship of the various parties.

Blackburn's claim was sustained by the District Court and a judgment entered in its favor for the full amount thereof (R., 619-620). The Trial Court ruled that Blackburn had complied with the condition precedent specified

in the Connecticut statute that it be a party "who has not been paid therefor" because, *under New York law,* Blackburn was empowered to switch the payments which it had received from Sherman between July 19, 1939 and January 9, 1940 and which, upon its books, had extinguished Sherman's obligation for the Fairfield deliveries, to obligations incurred by Sherman upon other jobs long after January 9, 1940 which were not in existence or even contemplated when the payments were originally received, thereby reviving the previously extinguished obligation of McGraw and the surety upon the statutory bond. The basis for the District Court's judgment was the supposed provisions of the New York law (R., 607-612). No reference whatsoever was made by the District Court to a single Connecticut authority or decision (Cf., *Klaxon Co.* v. *Stentor,* 313 U. S. 487, 496; *Griffin* v. *McCoach,* 313 U. S. 498, 504).

The Circuit Court of Appeals disagreed with the Trial Court's decision that the New York law applied, declaring that, under *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64, and kindred decisions, the Trial Court was required to apply the law of Connecticut to the facts of this case (149 Fed. (2), 301-305). Nevertheless, the Circuit Court affirmed the judgment in favor of Blackburn by ruling that, under *New York law,*(!) a letter from Blackburn to McGraw dated January 24, 1940, stating that its Newtown deliveries were unpaid, was sufficient to establish a legally operative intention to apply the payments made by Sherman between July 19, 1939 and January 9, 1940 to its deliveries on Sherman's other and subsequent jobs (149 Fed. (2), 301, 305-307). It brushed aside the petitioners' contention that, under Connecticut law, the principle of allocation of payments invoked by the Circuit Court, does not and cannot apply where, as here, only one indebtedness, *i.e.,* the Newtown indebtedeness, existed when the payments were received by Blackburn, that the Newtown

obligation was instantly discharged as a matter of law at that time that the payments were received; and that the debt could not be subsequently revived, by a cancellation of the payments, solely for the purpose of imposing an obligation upon McGraw and Aetna under their bond (149 Fed. (2) at 305, footnote 1).

The petitioners moved for a rehearing in the Circuit Court of Appeals wherein they emphasized the fact that the Circuit Court's decision upon this aspect of the cause was neither the law of the State of Connecticut nor the State of New York, nor, indeed, supported by the common law of any of the states of the union, the common law of England or the Roman Civil law from which the doctrine of allocation of payments was obtained. Two opinions were rendered by the Circuit Court of Appeals upon the petition for a rehearing; an opinion by Circuit Judge Clark reaffirming his prior position, and an opinion by Chief Judge Hutcheson vehemently dissenting therefrom (149 Fed. (2), 307-309). The third member of the Court, Judge Simons, apparently took no position upon the rehearing.

Judge Clark based the judgment of the Court squarely upon "the power of debtor and creditor to make their own agreement of allocation", under New York law, even though it resulted in an allocation of the payments to an obligation or claim which did not exist at the time that the payments were received, thereby subjecting the principal and surety upon a Connecticut statutory bond, to a liability for a debt which had already been discharged (149 Fed. (2), 307). Chief Judge Hutcheson refused to accept the proposition: "that Blackburn was a creditor whose claim was unpaid, when, as I read the record, the Newtown claim was paid and was later revived by agreement between Blackburn and Sherman. I think Judge Hincks finds as much, but he seems to believe that nobody

had anything to say about the application except debtor and creditor. I can't agree with him" (149 Fed. (2) at 308, footnote 1). The foregoing statements, declared the Chief Judge, were embodied in his original memorandum to the Court, when the case was first under consideration (149 Fed. (2) at 308).

In his opinion upon the petition for a rehearing, after referring to "that master darkener of counsel, my brother from Connecticut, with his firm footed statement of New York law" (p. 308), Chief Judge Hutcheson declared (pp. 308-309):

> "I only know that I turned aside from the sole and simple issue on which the decision rightly turned, whether Blackburn was, under the Connecticut statute, 'a party who * * * shall have furnished material or supplies * * * *and who has not been paid therefor*' (emphasis supplied), and, stumbling, lost my way. Then it happened to me, as it had to another and worthier Joseph, that my brethren 'said one to another, 'Behold, this dreamer cometh,' and they stripped me out of my coat, my coat of many colors, my wondrous judgment intuitive, the feeling which is the triumphant precursor of the just judgment, and cast me into a pit, a pit empty and full of darkness. But convinced against my will, I was of the same opinion still, and, reflecting on the admitted facts that 'all of the deliveries by Blackburn to the Newtown job were made between July 19, 1939, and January 9, 1940, that the moneys paid by Sherman to Blackburn during that period were sufficient to cover Sherman's indebtedness on that job', and that the Coxsackie job on which Blackburn and Sherman attempted to reapply the payments did not come into existence until January 24, 1940, I wondered why my original impression, that Blackburn was not a supplier whose claim was unpaid, was not right, and, wondering, moved groping toward the light. When then appellant, still on the Orlando

furioso side, but this time concentrating on the accepted fact that the critical payments to Blackburn discharged the Newtown indebtedness before the Coxsackie indebtedness came into being, filed its petition for rehearing, my darkness became light, and I saw face to face what before I had seen through a glass darkly, that 'the principle of allocation or appropriation of payments invoked by this court simply does not exist'. As appellant in the petition for rehearing very well states, 'A creditor who receives a payment from his debtor, without direction, at a time when only one debt exists, *has no choice,* no *right to allocate,* no *power to elect.* He must apply it upon the existing debt, and the law will do so even if he does not. By that application of law, the debt is *instantly* discharged upon the creditor's receipt of the payment'. Having been discharged, the debt could not be revived so as to make Blackburn, under the Connecticut statute, a supplier whose debt had not been paid. The error in the approach of the district judge and of the majority lies in the fact that they have assumed, contrary to the undisputed proof, that, when the critical payments were made by Sherman to Blackburn, there was in existence a running account of more than one debt, and Blackburn, having an option to apply the payment to one or the other of those debts, could exercise it in a reasonable time. I agree with the district judge, and with the majority, that the contract between Blackburn and Sherman was a New York contract, that the payments were made in New York, and that the law of New York determines whether or not Blackburn was a supplier whose debt had not been paid. I think it perfectly clear, though, that under the law of New York, as declared both in the Connecticut and the New York decisions, and as is the rule generally elsewhere, there being only one debt to which the payments could be applied when they were received by Blackburn, it was discharged. Having thus been fully paid, Blackburn could not, by an arrangement between him and the debtor,

again become, for the purpose of asserting a statutory liability against the surety, a person whose debt had not been paid. Looked at as the undisputed facts require it to be seen, this is a case where the debtor having fully paid the creditor, creditor and debtor, in order to assert a statutory liability against a surety, have undertaken to cancel the payment and revive the debt. So looked at, the case presents no difficulty either in law or in morals. The fallacy in the majority opinion lies, I think, in its failure to recognize the force of the admitted facts shown by plaintiff's exhibit 22, 'Sales made by Blackburn to Sherman Plastering Co.', that from June 29, 1939, to Jan. 24, 1940, when the Coxsackie job commenced, the moneys Sherman had paid in had completely discharged the debts then due, and that the Sherman-Blackburn arrangement was not an allocation of payments, not yet applied, but a cancellation of payments made in discharge of the Newtown debt, and their application to a debt created after that discharge. This, as between themselves, of course they could do, but they cannot do it as to the surety. I think it clear that the petition for rehearing as to Blackburn should be granted and the judgment in his favor reversed.

Jurisdiction of the Court

This application is made under Section 240 of the Judicial Code (28 U.S.C.A. §347).

The Issues Presented by this Petition

The within petition presents the following issues:

(1) That, under the Connecticut law which the Circuit Court was required to apply, *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64, the Circuit Court erred in ruling that a creditor who has received a payment from his debtor, without direction, at a time when only one indebtedness existed between them, possessed the right to cancel that

payment and re-apply the same to a subsequent indebtedness which did not exist at the time that the payment was received or the alleged allocation made, in order to enforce a statutory liability against the principal and surety upon a Connecticut bond as a party "who has not been paid" the amount of the discharged indebtedness.

(2) That, in deciding whether Blackburn was a party "who has not been paid therefor", *i.e.*, whether Blackburn had complied with the express condition precedent to the liability created by the Connecticut statute, the Circuit Court erred in ruling that the issue was to be determined by New York law. In refusing to hold that Connecticut law governed the question of Blackburn's compliance with the statutory condition precedent to the petitioners' liability upon a Connecticut bond required by a Connecticut statute, executed, delivered and performable in Connecticut, covering a Connecticut public work and deliveries of material in Connecticut, the Circuit Court of Appeals erroneously ignored the full faith and credit clause of the Constitution, as well as the doctrine of *Erie Ry. Co.* v. *Tompkins, supra.*

Reasons for the Allowance of the Writ

(1) The questions presented by this petition are of vital importance in the law governing the execution, interpretation, performance and enforcement of surety bonds required by statutes governing public works and public construction. If a materialman may, at any time that he pleases, cancel a payment for materials which he has delivered, at a time when such indebtedness constitutes the only indebtedness from his vendee, in order to re-apply the monies to a subsequently accrued obligation for the sole purpose of reviving the liability of a surety upon its bond, a startling change will have been effected in the settled law of centuries, opening the door to the grossest

of frauds and impositions. It was not the province of the Circuit Court to formulate new law for the State of Connecticut. It was obligated, under *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64, and kindred decisions, to apply the law of the State of Connecticut to the facts of the instant case. Its failure to do so necessitates a review of its determination by this Court.

(2) Of equal, if not greater, importance is the question of whether or not the State and Federal Courts are required by the full faith and credit clause of the Constitution, when called upon to enforce a statutory liability created by a sister State, to apply the law of the creating State in order to determine whether the conditions precedent to the statutory liability have been fulfilled. In this case, the State of Connecticut created a statutory right which had never existed before for the benefit of materialmen upon Connecticut public projects, circumscribing that right by attaching thereto the express statutory condition precedent that the only party who can avail himself of the statutory benefits was a party "who has not been paid therefor." By its decision that Blackburn was entitled to enforce the bond against the petitioners as a party "who has not been paid therefor" because it would be so considered, under New York law, *although under Connecticut law, it would be deemed fully paid,* the Circuit Court of Appeals ignored the full faith and credit clause of the Constitution and expanded the liability created by the Connecticut statutes for the benefit of non-residents and non-citizens of that State. The power of a State or a Federal Court to thus extend a State-created right, for the benefit of non-residents and non-citizens, under a set of facts which would have resulted in a denial of any recovery by the Courts of the creating State to its own citizens and residents, is an issue of such immense public importance that a review of the Circuit Court's decision

should be entertained by this Court (*Guaranty Trust Co. v. York,* 65 Sup. Ct. 1464, June 18, 1945).

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered on its docket 147, and that said decree of the United States Circuit Court of Appeals for the Second Circuit, affirming the judgment obtained by John T. D. Blackburn, Inc. against the petitioners, be reversed by this Honorable Court, and that Petitioners have such other and further relief in the premises as to this Honorable Court may seem just.

Dated, August 16th, 1945.

F. H. McGRAW & COMPANY, INC., and
THE AETNA CASUALTY & SURETY COMPANY,
By JOSEPH LOTTERMAN and
LOUIS A. TEPPER,
Counsel.

BRIEF IN SUPPORT OF THE FOREGOING PETITION

POINT I

Under Connecticut law, which the Circuit Court was required to apply, and New York law, which it purported to apply, Blackburn had no power to reapply the payments received from Sherman, without direction, at a time when only the Newtown indebtedness existed, to claims accruing long after the payments were received, in order to charge the petitioners, upon their bond, with the full amount of the Newtown deliveries.

As appears from the Circuit Court's opinion, it is undisputed "that all of the deliveries by Blackburn to the Newtown job were made between July 19, 1939, and January 9, 1940, and that the moneys paid by Sherman to Blackburn *during that period* were sufficient in amount to cover Sherman's indebtedness on the Newtown job" (149 Fed. (2), 301, 304).

It is likewise undisputed, upon the record, that *none* of the indebtedness to which those payments were subsequently applied was in existence, or even contemplated, between July 19, 1939, and January 9, 1940, when the payments were made and received. As appears from Blackburn's own records, Exhibit M-50 (R., 580) and Exh. 22 (R., 552), every one of the deliveries made by Blackburn after January 9, 1940—the date of the last delivery to the Newtown job—was made to Sherman's Dannemora, Coxsackie, Bedford Hills and Beacon jobs. Prior to January 9, 1940, and at the time that the aforementioned payments from Sherman were received by Blackburn, not a single penny of indebtedness was due to

Blackburn upon any one of these deliveries, each one of which was made after January 9, 1940, in most instances, many months after. *The only indebtedness existing at the time that the payments between July 19, 1939, and January 9, 1940, were made, was the indebtedness on the Newtown job* (149 Fed. (2), 308-309).

Upon these uncontroverted and conceded facts, the principle of allocation or appropriation of payments, invoked by the Circuit Court, simply does not exist. By its ruling that such a doctrine applies to the instant case, empowering the creditor to make an application of the payments, within a reasonable time after their receipt, "to debts not yet matured", even though only one indebtedness was in existence when the payments were made, *the Circuit Court has formulated a rule of law which is entirely unique in the law of payment.* Its decision contravenes the law of Connecticut, which it was required to apply, as well as the law of New York which it purported to apply. It is unsupported by the common law of the various states, the common law of England and the Roman Civil law from which the doctrine of allocation was first obtained.

Under the law, as it existed and was universally applied before the Circuit Court's decision in this case, a creditor who receives a payment from his debtor, without direction, at a time when only one debt exists, *has no choice, no right to allocate, no power to elect.* He *must* apply it upon the existing debt and the law will do so even if he does not. By that application of law, the debt is *instantly* discharged upon the creditor's receipt of the payment.

That the Circuit Court's contrary view is opposed to the law of Connecticut is apparent from the decision by the Supreme Court of Errors of *Connecticut in Blinn* v. *Chester,* 5 Day (Conn.) 166. In that case, the defendant made a payment of $30 "without any direction as to the

application of it" (p. 167). At that time, the defendant owed the plaintiff upon a written contract. There was also, at that time, an unsettled book account between them. The plaintiff applied the payment to the book account, contending that "if the debtor at the time of payment does not direct to what account it shall be applied, the creditor may at the time have his election in making the application." The defendant contended that the payment had to be applied, as a matter of law, to the contract indebtedness, and that the creditor had no power of election whatever because (p. 167):

> "There was no evidence of any existing debt in favor of the plaintiff except what was due upon that contract. If there was only one debt, the payment must necessarily be applied in discharge of that alone. In the cases, both in *Vernon* and *Cranch,* there were two existing debts. In the present case, it is only stated that there was an unsettled book account subsisting between the parties; but it does not appear that the defendant was in arrear to the plaintiff."

In sustaining the contention that the plaintiff had no power of allocation or appropriation where only one indebtedness existed at the time that the payment was made, the Supreme Court of Errors, per Reeve, J., declared:

> "In this case, there does not appear to be any debt due to the plaintiff from the defendant except what arose out of the contract. It is true that there was an unsettled account; but from this, no inference can be made that the defendant was in arrear on that account to the plaintiff. It might as well be inferred that the plaintiff was in arrear to the defendant. *There was, then, no debt due, but that upon the contract. There was no need of any direction to the plaintiff to apply the payment to this debt. The law made the application of it to this;* and this is all the defendant claims." (Italics ours.)

The foregoing principles of law have been constantly reiterated and applied by Connecticut's highest Court. "These payments should have been accepted and applied to that portion of the indebtedness and to the notes due when these payments were made. When so applied, the debt or debts now said to be due when this action was brought were necessarily extinguished" (*Schwartz* v. *Dashiff*, 92 Conn. 135, 138.) A payment cannot be applied, "where no direction has been given by the debtor, to a demand not due when payment is made, if there be another debt already due" (*Stamford Bank* v. *Benedict*, 15 Conn. 437, 443).

The law of New York is identical. In *Stone* v. *Seymour*, 15 Wend. 16, Chancellor Kent, discussing the doctrine of allocation under the civil and common law, declared at page 21:

> "A fourth principle appears to be equally well established, to wit: where no application of the payment is made by the debtor or with his assent at the time it is received, *and there is an existing indebtedness to the amount of such payment, it shall be applied to that; and neither the creditor or the Court shall apply such payment to a debt which was not then due and payable.*" (Italics ours.)

In *Shipsey* v. *Bowery National Bank*, 59 N. Y. 485, the New York Court of Appeals declared at page 492:

> "The plaintiff, when the money was received, made no specific appropriation. If he had distinct causes of indebtedness, he was not obliged immediately to designate where it should be applied. He then would have a reasonable time in which to elect. (*Sheppard* v. *Steele*, 43 N. Y. 52.) He did, in a reasonable time, make an election to apply it toward payment of other unpaid and protested checks drawn by Merritt, and held by plaintiff. *But this it is claimed that he could not do, because*

Merritt was not then indebted to him thereon; that the only indebtedness was on the lost check; and that where there is but a single indebtedness, by operation of law, any payment is at once applied upon that. This conclusion would follow if the premises were correct." (Italics ours.)

Again, in *Baker* v. *Stackpoole,* 9 Cow. (N. Y.) 420, 436:

"No case has been cited, and I presume none can be found, carrying the creditor's right so far as to retain money in his hands to apply upon any future indebtedness, leaving a prior demand unpaid. The moneys received by the respondent, therefore, should be applied to pay, as far as they went, all the claims he had * * *" [semble: *North American Fisheries & Cold Storage, Ltd.* v. *Greene,* 195 App. Div. 250; *Niagara Bank* v. *Rosevelt,* 9 Cow. (N. Y.) 409].

The Circuit Court's ruling likewise contravenes the common law of the various States, exemplified by the decision of the Supreme Court of South Carolina in *Reid* v. *Wells,* 56 S. C. 435, 442; 34 S. E. 401, 403:

"The rule is too well settled to need a citation of authority to support it, that where a person owes two debts to another and makes a payment to the creditor, the debtor has a right to direct the application of such payment, provided such direction is given before or at the time of making such payment; but if no direction is thus given, then the creditor may apply such payment to either of the two debts as he may see fit. * * * Under the terms of the rule, it must appear that the defendant owed *two* (italics are the Court's) debts to the plaintiff; and we agree with the Circuit Judge in holding that the plaintiff utterly failed to show that the defendant owed him anything on the open account. Hence, even if the defendant never gave the plaintiff any directions as to the application of the proceeds *of her cotton, such proceeds must*

> *necessarily be applied to the only debt which has been shown to be due by the defendant to the plaintiff,* to wit: the debt secured by the note and mortgage." (Italics ours.)

Similarly, in *International Harvester Co.* v. *Holmes,* 165 Wisc. 506, 510; 162 N. W. 925, 926, 927, the issue presented was phrased by the Supreme Court of that State as follows:

> "Could the plaintiff apply the voluntary payment made by the mortgagor to the notes not yet due to the prejudice of the guarantor of the note which was then past due?"

Its ruling was as follows:

> "There is no dispute that when a debtor makes a payment without application a creditor cannot apply the amount of the payment to a debt not due, to the exclusion of one due or overdue. 30 Cyc. 1237, and cases cited; *Cain* v. *Vogt,* 138 Iowa 631, 116 N. W. 786, 128 Am. St. Rep. 216. Therefore, as against the defendant, *the plaintiff was bound to apply the proceeds of the voluntary payment to the notes in the order of their maturity. Upon making such application the note guaranteed by the defendant must be held to be paid, and the* defendant discharged." (Italics ours.)

The English common law is identical. In *Lamprell* v. *Billericay Union,* 3 Exch. 283, 307, 154 Eng. Rep. 850, 860, the English Court declared:

> "But before any such question can be raised (*i.e.,* the creditor's right of election), *it is plain that there must be two debts.* * * * On these grounds we think that the doctrine as to the creditor's right, by applying indefinite payments to whichever of two debts he may prefer, does not apply in the present case. (Italics ours.)

Munger, Application of Payments, p. 48, citing a host of authorities, states:

> "The claims upon which the creditor makes application must at the time be due and payable. He cannot apply it to a debt not than payable and demandable, if there be another debt then due; nor partly on debts then due and partly on debts not then due; nor retain it in his hands to apply upon a future indebtedness, leaving a prior demand unpaid; nor, where he has an existing claim against the debtor, apply the payment to extinguish his contingent liability on a note which he has endorsed for him."

Under the Roman Civil law, as set forth in full at pages 5 to 9 of Munger, *supra*, it is declared that the creditor's right to allocate, in connection with payments received from a debtor, without direction, a principle known to the Civil Law as "imputation of payments", depends, as a *sine qua non* to the exercise thereof, upon the existence of more than one due and payable obligation at the time that the payment is received (Semble: *Williston, Contracts*, vol. 6, §1797, p. 5111 and cases cited; *Restatement of the Law of Contracts*, §389 (a)).

In the instance case, the payments received by Blackburn from July 19, 1939, to January 9, 1940,—ranging over a period of six months to three weeks before the attempted allocation herein—would be applied by the Connecticut, New York, common law and civil law to the immediate extinguishment of the Newtown indebtedness which cannot, thereafter, be revived against the petitioners, as principal and surety upon a statutory bond, by the action of Blackburn acting alone or in concert with his debtor.

Judge Clark's attempted distinction of the cases that the petitioners "so much stress" upon the ground that they "involved a dispute as to allocation between debtor

and creditor" and not between a creditor and third persons derivatively liable (149 Fed. [2d], 301, 307) is simply without foundation in fact. *International Harvester Co. of America* v. *Holmes,* 165 Wisc. 506, 510; 162 N. W. 925, 926-927, involved the guarantor of a note and the holder thereof; *United States, to Use of Jackson Ornamental Iron & Bronze Works* v. *Brent,* 236 Fed. 771, involved a materialman and a surety, precisely as here; and, similarly, in *U. S. Fidelity & Guaranty Co.* v. *Eichel,* 219 Fed. 803 and *Columbia Digger Co.* v. *Rector,* 215 Fed. 618, the issue likewise involved a surety and a creditor (Semble: *Wait* v. *Homestead Building Association,* 81 W. Va. 702, 95 S. E. 203; 40 Am. Jur., Payment, §116, and cases cited).

The Circuit Court's conclusion to the contrary is utterly unprecedented in the law of payment and constitutes a complete negation of the Connecticut law which it was required to, but did not, apply (*Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Klaxon* v. *Stentor Electric Mfg. Co.,* 313 U. S. 487, 496; *Griffin* v. *McCoach,* 313 U. S. 498).

POINT II

In failing to construe the words "a party who has not been paid therefor" contained in the Connecticut statute and the surety bond issued thereunder, as those words would be interpreted by a Connecticut court under Connecticut law, the Circuit Court improperly ignored the full faith and credit provisions of the Federal Constitution.

In this case, and by the assertion of its claim against McGraw and Aetna, Blackburn sought to invoke for its benefit, the provisions of a statute enacted by the State of Connecticut, [Sect. 540d (r), General Statutes, Supp. 1937.] That statute required the petitioners' execution of a surety bond which, according to Blackburn, inured to

its benefit because it had furnished materials in the State of Connecticut to a Connecticut project constructed under a Connecticut contract between McGraw and the State of Connecticut. The bond, likewise, had been executed by the petitioners in the State of Connecticut as a Connecticut obligation, filed with the Connecticut Commissioner of Public Works and performable in Connecticut. Under the Connecticut statute, as well as by the terms of the bond itself, the instrument inured to the benefit of a party who furnished materials or supplies or performed labor in the prosecution of the work, and "who has not been paid therefor".

In short, the State of Connecticut, in creating a statutory right which has never existed before, for the benefit of those persons who had performed labor upon, or furnished materials to, a public work in the State of Connecticut (*Pelton & King* v. *Town of Bethlehem*, 109 Conn. 547) had circumscribed that right by attaching thereto the express statutory condition that the only party who can avail himself thereof is a party "who has not been paid therefor." No claimant can recover under the Connecticut bond prescribed by Connecticut law for materials delivered in Connecticut to a Connecticut project who does not satisfy the condition that he be a party "who has not been paid therefor."

The question is thus presented: *what law shall determine whether the condition precedent to the liability under the statutory bond has been complied with? What law shall determine whether the claimant is a party "who has not been paid therefor"?*

The petitioners respectfully submit that, under the full faith and credit provisions of the Federal Constitution, the State which created the obligation sought to be enforced, the State which created the condition to the enforcement of that obligation, is the only State whose law can define and determine the meaning, scope and content of the condition which itself has imposed (*New*

Britain Lumber Co. v. *American Surety Co.*, 113 Conn. 1; *Cf. Tenn. Coal Co.* v. *George*, 233 U. S. 354, 360; *Bradford Elec. Co.* v. *Clapper*, 286 U. S. 145, 160; *Hutchinson* v. *Ward*, 192 N. Y. 375; *Restatement, Law of Conflict*, §618).

The issue in the instant case is not whether Blackburn and Sherman, for obvious reasons, had reached an agreement between themselves, that Sherman owed Blackburn money for the Newton deliveries. Sherman could confess any judgment to Blackburn that it pleased. It could subject itself to any liability that it chose. It could not, however, by any such conduct, subject the petitioners to any liability greater or different than the liability created by the Connecticut statute. This case does not involve a suit by Blackburn against Sherman predicated upon an alleged admission of liability. It involves a claim by Blackburn against McGraw and Aetna upon a statutory bond, Blackburn asserting that, under the applicable Connecticut Statute, he is a party "who has not been paid" for his Newtown deliveries. In order to recover under the surety bond prescribed by Connecticut law, Blackburn was required to establish that he was an "unpaid" party *under the law of Connecticut*, not under the law of New York. In ruling to the contrary, the Circuit Court of Appeals adopted a rule which would not even be applied by the New York Courts, had this cause been tried in New York.

In *Graybar Elec. Co.* v. *New Amsterdam Cas. Co.*, 292 N. Y. 246, the New York Court of Appeals was required to determine a materialman's suit against a contractor under a surety company bond filed by the contractor upon a Tennessee project, as required by a Tennessee statute. The defendants claimed that the plaintiff had failed to comply with the conditions prescribed by the statute as necessary to a recovery. After emphasizing that the bond was a statutory bond, "made and delivered in Tennessee and was there to be performed", the New York Court of

Appeals ruled that the provisions of the Tennessee statute "were limitations of the liability undertaken upon the bond in suit" and that:

> "The Tennessee statute (as so construed by the highest court of that State) must here be accorded the full faith and credit which is enjoined by the Federal Constitution in respect of the 'public acts' of a sister State. (John Hancock Ins. Co. *v.* Yates, 299 U. S. 178.)

As we have shown above, under the facts herein disclosed, if Blackburn were a Connecticut resident, conducting all of his business in the State of Connecticut, he would not be deemed by the Connecticut Courts a party "who has not been paid therefor." The result, therefore, of the Circuit Court's ruling is to permit a recovery by non-residents and non-citizens of the State of Connecticut which that State, by its own law, under the statutory liability which itself has created, would deny to its own citizens and residents. That is precisely what is forbidden by the full faith and credit clause of the Constitution. Where one State makes the existence of a statutory right conditional upon some act or event, no suit can be maintained in another State unless the condition is satisfied in accordance with the law of the creating State [*Restatement of the Law of Conflicts,* §618, and authorities cited].

"The courts of the sister state, trying the case, would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which name conditions on which the right to sue depend" (*Tenn. Coal Co.* v. *George,* 233 U. S. 354, 360). "To refuse to give that defense effect would irremediably subject the Company to liability. Because the statute is a 'public act', faith and credit *must* be given to its provision * * *" (*John Hancock Mutual Life Ins. Co.* v. *Yates,* 299 U. S. 178, 183).

The foregoing principles are particularly applicable to a Federal Court. "* * * since a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the state, it cannot afford recovery if the right to recover is made unavailable by the state nor can it substantially affect the enforcement of the right as given by the state" (*Guaranty Trust Co.* v. *York,* 65 Sup. Ct. 1464, June 18, 1945.)

American Woolen Co. v. *Maaget,* 86 Conn. 234, in so far as it ruled that, upon the facts therein, New York law governed the alleged allocation of payments, does not apply to the instant case. In that case, the Court was confronted with a completely New York transaction, involving an ordinary common law action for goods sold and delivered in New York, arising between a New York vendor and vendee. It did not involve a third party derivatively liable upon a statutory cause of action created by Connecticut legislation, involving Connecticut deliveries to a Connecticut project by a materialman who sought to recover against the principal and surety upon a Connecticut bond by asserting a claim that, as to such third persons, he was a party "who has not been paid therefor."

CONCLUSION

The writ of certiorari should be granted as prayed for.

Dated, August 16th, 1945.

Respectfully submitted,

JOSEPH LOTTERMAN and
LOUIS A. TEPPER,
Counsel for Petitioners.

(18)

Supreme Court of the United States

OCTOBER TERM, 1945

No. 347

F. H. McGRAW & COMPANY, INC.,
Plaintiff-Petitioner,

v.

JOHN T. D. BLACKBURN, INC.,
Defendant-Respondent,

and

THE AETNA CASUALTY & SURETY COMPANY,
Third Party Defendant-Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 347

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v.

JOHN T. D. BLACKBURN, INC.,
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THE AETNA CASUALTY & SURETY COMPANY,
Third Party Defendant-Petitioner.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioners present one point (though argued as two) namely, that Blackburn, contrary to the law of Connecticut, instead of applying the money he received from Sherman to the only existing debt, allocated it to claims accruing thereafter. They are confined to this point (*Steele* v. *Drummond,* 275 U. S. 199).

Summary of Argument

Respondent argues that:

1. The evidence shows that the application of January 24, 1940 was made upon debts actually due for previous shipments.

2. The law of New York controls, and that law is the same as that of Connecticut.

3. Under New York as well as under Connecticut law petitioners have no right to object to the allocation, the debtor consenting.

We urge therefore that (a) there is no question of law, or any of importance, before this Court, and (b) there is no ground for believing that the Circuit Court probably decided a question of local law in conflict with the applicable local decisions under Rule 38, Subd. 5(b). To grant the application for a writ would in effect merely give another hearing to a defeated party in the Circuit Court where he has already had *two* hearings,—something this Court does not regard within its certiorari jurisdiction (*Magnum* v. *Coty*, 262 U. S. 159, 163).

POINT I

The evidence shows that the application of January 24, 1940 was made upon debts actually due for previous shipments.

To make their point petitioners set forth as "undisputed" fact that on January 24, 1940 no account was open except the Newtown, no deliveries were made from July 19, 1939 to January 24, 1940 to any other job and hence the money received from Sherman was allocated to deliveries made thereafter to *Coxsackie* and three other jobs. None of these statements is true. The burden is on the petitioners, and that they recognized by pleading payment (R. 50, 58); *Lewis* v. *So. Shore etc. Assn.*, 211 App. Div. (N. Y.) 831. The record, i.e. Blackburn's ledger cards (Ex. M-50, at R. 580), the analysis of the cards (Ex. 22, at R. 552), the invoices (Exs. 3 and 4, R. 526, unprinted but exhibited to the Circuit Court), and Blackburn's explanatory testimony tell an altogether different story.

These records and the allocation were savagely attacked as the work of Satan—all in vain (149 Fed. 2nd 305), and even Judge Hutcheson found more heat than light (149 id. 308).

The ledger cards, the key-numbers used by the bookkeeper being explained (R. 456-458), are perfectly clear. Not every debit entry indicates a shipment. Debits preceded by a .30 next to the invoice number are charge-backs of defaulted checks, notes and trade acceptances therefore credited as payments. Only .10 debits indicate shipments. All credits, whether by cash or paper, are shown by a .20 on the credit side. When the paper was dishonored the amount previously credited (plus interest and protest fees) was charged back in the debit column following a .30.

Examining Exhibits 22 and M-50 we find:

(1) From Jan. 18/38 to Jan. 24/40		
Shipments to Newtown job...	*$13,622.33	
Shipments to other jobs.....	31,373.18	$44,995.51
(2) From July 19/39 to Jan. 24/40		
Shipments to Newtown job ..	9,009.64	
Shipments to other jobs	**13,005.48	
(3) Cash payments from Jan. 18/38 to Jan. 24/40		30,301.83
(4) Balance due on Jan. 24/40		
Newtown	9,009.64	
Others	5,684.04	14,693.68

The foregoing summary disproves every assumption of fact upon which the petitioners have based the only

*$4,622.69 (paid for) before July 19, 1939 and $9,009.64 after July 19, 1939 (still unpaid).

**$1,653.57 to Coxsackie and $11,351.91 to other non-Newtown jobs.

ground of their petition. The story of only one debt existing on January 24, 1940 is fictitious; there were then fourteen *other* debts aggregating over five thousand dollars. The letter of January 24, 1940 (Ex. 24, at R. 554) acted as an application of the total payments, *i. e.*, $30,301.83 to the non-Newtown shipments, leaving the whole of the Newtown obligation unpaid, as well as $5,684.04 on the other deliveries. There was no need of creating allocations upon future shipments.

If anything else were required to refute petitioners' argument, we find it at hand in the post-January 24, 1940 ledger account:

Shipments after January 24, 1940	$6,404.34
Debt carried over from the preceding period	14,693.68
Total Liability at close of account	$21,098.02
Payments after January 24, 1940	11,183.27
Unpaid at close of account	10,115.75

This total corresponds substantially with final balance shown in the balance column of Ex. M-50. *Not one dollar of these payments after January 24, 1940 came from McGraw,* its last payment ($500.00) having been made on January 10, 1940 (Ex. M-6, not printed, offered and received in evidence at R. 217, referred to at R. 572).

This sum is made up of the Newtown debt of $9,009.64 and the following balances on non-Newtown jobs: pre-January 24, 1940, $473.96, and $632.15 after that date—as shown by Ex. 22.

In spite of this record proof petitioners at every turn continue to make statements which have no support anywhere in the testimony or the documentary evidence. Even Judge Hutcheson (tho he dissented) agrees that both the district judge and the majority of the Circuit Court assumed that during the critical period there was in existence a running account of more than one debt

(petition p. 8). Petitioners finally turn to the Findings (petition, p. 3). They quote the first half of Finding No. 22 to the effect that, if the payments in Finding No. 20 were all applied against the earliest sales then unpaid, the Fairfield (Newtown) job would be deemed fully paid and discharged, but they fail to quote the second half, which reads:

> "But, if Sherman's said payments be deemed all applied against indebtedness for material furnished for jobs other than the Fairfield job, then Blackburn's claim of $9,009.64 for the material furnished to the Fairfield job remains wholly unpaid."

Finding No. 23 of which petitioners quote only a part on page 3 of their petition, reads as follows:

> "There is no proof that prior to January 22, 1940 Blackburn manifested an intent to apply the several payments theretofore made by Sherman to Sherman's indebtedness on account of specific sales of material used elsewhere than in the Fairfield job. On January 24, 1940, at Sherman's request, indeed at Sherman instigation, Blackburn first formulated an intent to apply all payments received from Sherman subsequent to July 19, 1939 to jobs other than the Fairfield job, and on the strength of such allocation, notified McGraw by letter that its account against Sherman on account of the Fairfield job was unpaid to the extent of $8640.16" * * *.

At this point petitioners gratuitously assume that the "other" jobs referred to in the last Finding had to do with those which were commenced after the last delivery to the Newtown project, *i. e.*, January 9, 1940. There is nothing in the Finding to justify so wild an assumption. It would be doing the district judge an injustice to believe that he would so lightly ignore the Blackburn records. The contrary becomes clear when all the findings are read together in the light of the issues before the court. Yet petitioners seriously present these wishful inferences as "undisputed" evidence.

POINT II

The law of New York controls and that law is the same as that of Connecticut.

The contract between Blackburn and Sherman, having been made in New York and calling for shipment and payment there, is governed by the laws of that state (*Holzer* v. *Deutsche, etc., Gesellschaft,* 277 N. Y. 474, 479; *Salimof & Co.* v. *Standard Oil Co.,* 262 N. Y. 220; *American Woolen Co.* v. *Maaget,* 86 Conn. at p. 243). "The law of the place of performance governs the application of a payment to one or another of several debts payable there by the person making the payment to the person receiving it" (Restatement of Conflict of Laws, § 368).

Petitioners nevertheless insist upon shifting the situs to Connecticut on two grounds: (a) *Erie Ry. Co.* v. *Tompkins,* 304 U. S. 64 and (b) the bond sued on is a creature of that state. Now *Erie* v. *Tompkins* in no way interferes with the fact that the New York law in this case controls on the question of allocations. It holds merely that a United States Court in Connecticut, in applying the law of New York, must accept the version of that law laid down by the Connecticut Appellate Courts, whether mistaken or not. In the *American Woolen* case the Supreme Court of Connecticut held that New York follows the "reasonable time" rule. The Circuit Court, in discussing the matter of the timeliness of the application only, felt itself bound by that decision. However, no Connecticut Court has ever ruled on what the New York law is on any other phase of the law of allocations, and certainly not on the New York law as applied to unmatured debts. Strange it is, therefore, for petitioners' counsel to be astonished at Judge Clark's choosing to look to the New York decisions alone for a solution of the present problem. Judge Hutcheson agrees with Judge Clark in this respect (Petition, p. 8, bottom).

Petitioners further contend that we must look to the law of Connecticut for the construction of the phrase "who has not been paid therefor", because respondent owes his remedy on the bond to a statute of that State. There is nothing absolute about the full faith and credit clause, to which petitioners appeal (*Klaxson Co.* v. *Stentor Co.*, 313 U. S. 487, 498). The statute seeks protection from the Constitution only for what is different or unique about it. It cannot, for example, object to construction by foreign Courts (*Allen* v. *Alleghany Co.*, 196 U. S. 458, 464-5). It is interested only in receiving respect for its substantive provisions. The provision that an unpaid materialman or sub-contractor may bring suit on the bond may seem substantive at first glance, but the point is fallacious. The statute lays down no standard or measure of payment. The phrase means merely that the remedy is open to any person related to the improvement who has a cause of action. It goes without saying that such a person's claim has not been paid and that his claim is based upon a legal and sufficient consideration. To be consistent petitioners must take the stand that all of these matters must be decided by Connecticut law. The statute intimates no such result. It is altogether silent on this point. The statute undoubtedly assumed that non-resident contractors would enter bids and that contracts between non-residents would result, who would base their conduct upon the law of their own jurisdiction. The statute clearly left it to that law to determine whether the complaining party had been paid.

Graybar Electric Co. v. *New Amsterdam Gas Co.*, cited by petitioners on page 22 of their petition, is not in point. That case held that a claimant must comply with the statutory conditions of notice of claim and of time to bring suit. The case did not involve any such condition for bringing suit as is raised by the petitioners in this case.

POINT III

Under New York, as well as under Connecticut law, petitioners have no right to object to the allocation, the debtor consenting.

Petitioners' Point One is an example of the straw-man technique. The Circuit Court is attacked for a decision it has not made. No Court permits a creditor to allocate to an unmatured debt. But suppose, as in our case, the debtor agrees, may third parties complain? To that question the Circuit Court has given a negative answer, rightly holding that the rule is intended only for the protection of the debtor (149 Fed. 2d 306). That question petitioners have not seen fit to argue and support. In *Blinn* v. *Chester*, 5 Day (Conn.) 166 (their Brief page 14) and the two other cases cited on page 16 the controversy was between *debtor and creditor*. So with all the other cases cited, except for a few, which do not represent the general trend and surely not the law of New York or Connecticut.

That trend is based upon the principle (as the Circuit Court phrases it) "that mutual assent may validate either a change in application or an original application otherwise not permissible" (149 Fed. 2nd 306). That "otherwise" does not confine itself to applications made to unmatured debts but holds good with respect to other phases of the law of allocations. Indeed, the role of third persons in this connection is insignificant, unless they have equities on their side equivalent to a trust. As was said in *Harding* v. *Tifft*, 75 N. Y. 461, 464: "The equities referred to, however, are usually equities existing *between the debtor and creditor*, and I have found no case recognizing those arising out of transactions between the debtor and third persons of which the creditor has no notice." So, Professor Williston (Contracts, Vol. 6, § 1804): "The debtor and creditor have ordinarily exclusive power to determine the application of payment, and in exercising this power are not obliged to consider

the interests of other persons, such as sureties, unless the source from which the payment is derived (and, perhaps the creditor's knowledge of that derivation), imposes a duty on the debtor or creditor." To the same effect: 48 Corp. Jur. § 123, p. 663; *U. S.* v. *Phila. etc. Bank,* 272 Fed. 371 (Mod. 263 Fed. 778); *Grant* v. *Keator,* 117 N. Y. 369, 377; *Louis* v. *Bauer,* 33 App. Div. (N. Y.) 287. *Re Stacy Wolf Hat Co.,* 99 Fed. 2d 793, 795. This general principle was followed in a Connecticut case (*Tomlinson Carriage Co.* v. *Kinsella,* 31 Conn. 268, 272-273) where the Court approved, *as against a third person,* an allocation to an *illegal* debt which the debtor had agreed to. *Connecticut would undoubtedly apply the same logic with respect to every other application which the creditor may not make without the debtor's consent.* This Court in *Field* v. *Holland,* 6 Cranch. 8, 28, says that application may not be made to a debt not due "unless this legal operation of credit should be changed by *express agreement.*" The same problem was solved in a forthright way in *Mack* v. *Adler,* 22 Fed. 570, where sureties (plaintiffs) objected to such an allocation. The Court says at page 572:

> "It will be observed that Poe & Co., the debtors, are not objecting, but consenting to the appropriation made by the creditors. *What right have the plaintiffs to demand a change in the appropriation assented to by the debtor and creditor? Upon what principle can a stranger come between a debtor and his creditor and dictate the appropriation of payments against the will of both?*" (*Italics ours.*)

Petitioners constantly treat the present issue as if the mere receipt of the funds was an allocation in favor of McGraw and the letter of January 24th was a change or revocation once made. The answer is that, even where the creditor has exhausted his right, the debtor may consent to a change of allocation (*Thompson* v. *W. B. Reeve Co.,* 170 Ark. 409; *Re Stacy Wolf Hat Co.,* 99 Fed. 2d 793, 795.

Conclusion

We reiterate that petitioners' argument of the only point submitted has assumed a non-existent state of facts. The petition presents no question of law or any question of importance. We have confined ourselves to the discussion of the point presented by the petitioner. We join with the Milcor Steel Company (by their consent) in their contention that the petitioners irregularly split a single petition into two in violation of the rules of this Court. The petition for writ of certiorari should be denied.

Respectfully submitted,

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(19)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 347

F. H. McGRAW & COMPANY, INC.,
Plaintiff-Petitioner,

v.

JOHN T. D. BLACKBURN, INC., and MILCOR STEEL CO.,
Defendants-Respondents,

and

THE AETNA CASUALTY & SURETY COMPANY,
Third Party Defendant-Petitioner.

Petitioners' Reply Brief in Opposition to the Answering Brief of the Respondent, John T. D. Blackburn, Inc.

This reply brief will concern itself solely with the statement made by the respondent, John T. D. Blackburn, Inc. in Point I of its answering brief that: "The evidence shows that the application of January 24, 1940 was made upon debts actually due for previous shipments." The argument is based upon a group of figures set forth on pages 3 and 4 of the respondent's brief for which there is no support whatsoever in the record. To dispel any

erroneous impression which might possibly be created by those non-existing figures, we turn to the record:

The only original records maintained by the respondent, John T. D. Blackburn, Inc., for the Sherman account consisted of four original ledger cards which were received in evidence as Exhibit M-50 (R. 439-440; 499; 580). They contained periodic typewritten entries of general credits and debits, representing, in Blackburn's own words, "one continuous running account of all jobs" (R. 455-456; 498). They were received in evidence as Exhibit M-50 (R. 455), solely and only for the typewritten material contained thereon and the pencil notations showing the destination of each shipment, all of the other pencil and ink notations being disregarded in their entirety (R. 454-455). They were maintained under the complete supervision of Charles V. Legge, Blackburn's secretary-treasurer for approximately fifteen years (R. 519), until he left the company's employ in September of 1940 (R. 446-448; 470; 501), approximately six months after the present action was instituted.

An examination of Exhibit M-50 (R. 580) reveals the following entries:

Date and Folio		Debit	Credit	Balance
Dec 28 '39.....	7,885.10 #		50.00	917.41 —CR
Jan 24 '40.....	620.10 #	65.95		1,810.10 —CR
Jan 26 '40.....	745.10 #	337.92		1,185.02 —CR

Thus, from Blackburn's own original records, it undisputably appears that, on January 24, 1940, two weeks after the last delivery to the Newtown job, Sherman's credit and debit account on Blackburn's books showed a credit balance of $1,810.10 which had extinguished all of Sherman's obligations, including his obligations for the Newtown deliveries. From that day onward, Sherman's

credit balance was wiped out and his debit balance steadily rose as a result of Blackburn's deliveries to Coxsackie, Dannemora, Bedford Hills and Beacon jobs which were made after January 24, 1940, resulting in the final debit balance of $10,157.47 (Exhibit M-50, R. 580). Obviously, therefore, that entire debit balance was due to the obligations incurred by Sherman long after January 9, 1940, the date of Blackburn's last delivery to the Newtown job.

In ruling that the subsequent obligations had been discharged and the Newtown indebtedness was still unpaid, the Trial Court necessarily ruled that the monies received by Blackburn between July 19, 1939 and January 9, 1940 could be reapplied, many weeks and months after the monies were received, to obligations which were not in existence, or even contemplated, when the payments were made. Chief Judge Hutcheson, in his dissenting opinion, found the foregoing fact to be "undisputed" and established by the "admitted facts" (149 Fed. (2nd) 308, 309). Judge Clark, in his majority opinion, does not deny the existence of the fact (149 Fed. (2nd) 307). He based his position upon the contention that the law, as he viewed it, permitted such a reallocation of payments received under such circumstances to an obligation which did not exist, or accrue, until long after the payments were made (149 Fed. (2nd) 307, footnote 1).

Judge Clark's reference to "the jumbled bookkeeping accounts contained in Exhibits 22 and M-50" (149 Fed. [2d] 307, Footnote 1) is, of course, of no aid to the respondent. The records to which the Judge referred are the respondent's own records. It bore the burden, throughout the course of these proceedings, of establishing its compliance with the condition precedent to its recovery upon the Connecticut bond involved in this action, *i.e.*,

that it was a party "who has not been paid" for its deliveries to the Newtown job. Consequently, unless Judge Clark's view of the law is correct, the respondent must fail. And, as we have pointed out in our original brief, Judge Clark's view of the law contravenes the law of Connecticut, the law of New York, the common law of the various States, the common law of England and the Roman Civil law from which the doctrine of allocation was first obtained.

No other claim or argument contained in the respondent's brief requires any answer under the authorities contained in our original brief.

Dated, September 20, 1945.

Respectfully submitted,

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LOUIS A. TEPPER,
Counsel for Petitioners.

No. 348 (20)

IN THE

Supreme Court of the United States

..... TERM, 1945

F. H. McGRAW & COMPANY, INC.,
Plaintiff-Petitioner,

v.

MILCOR STEEL CO. and JOHN T. D. BLACKBURN, INC.,
Defendants-Respondents,

and

THE AETNA CASUALTY & SURETY COMPANY,
Third Party Defendant-Petitioner.

PETITION AND BRIEF FOR A WRIT OF CERTIORARI

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Plaintiff-Petitioner,

v.

MILCOR STEEL CO. and JOHN T. D. BLACKBURN, INC.,
Defendants-Respondents,

and

THE AETNA CASUALTY & SURETY COMPANY,
Third Party Defendant-Petitioner.

Petition for a Writ of Certiorari

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioners, THE AETNA CASUALTY & SURETY COMPANY and F. H. MCGRAW & COMPANY, INC., respectfully pray for a writ of certiorari to review a decree of the Circuit Court of Appeals for the Second Circuit, entered on May 22, 1945, affirming a judgment entered by the United States District Court for the District of Connecticut in favor of the respondent, Milcor Steel Co., against the petitioners, for the sum of $6,372.51, with interest and costs (R., 619).*

* (R.) with a numeral indicates a page reference to the transcript of record in the Circuit Court of Appeals.

Summary Statement of Matters Involved

F. H. McGraw & Company, Inc., a New Jersey corporation, engaged in business as a general contractor and builder in the State of Connecticut, received a contract from the State of Connecticut, on or about August 16, 1938, for the general construction of the Continued Treatment Units, Fairfield State Hospital, at Newtown, Connecticut. In connection therewith, and as required by Connecticut Statutes, it filed a surety bond, executed by itself as principal and The Aetna Casualty & Surety Company as Surety (R., 110-112; 599-600).

On or about September 1, 1938, McGraw entered into a written subcontract with the Sherman Plastering Co. Inc., a New York company, whereby the latter company undertook to perform certain work and furnish certain materials to McGraw's Newtown project (R., 109; 600-601). Between July 1, 1939 and January 1, 1940, Sherman purchased materials from the Milcor Steel Co., a Delaware company, for delivery to the Newtown job. Thereafter, during the course of these proceedings, Milcor filed a claim against McGraw and Aetna, as principal and surety upon the statutory surety bond, claiming that it had not been paid for the materials delivered to the Newtown job, amounting to the sum of $6,372.51. Blackburn, from whom Sherman had also purchased materials, likewise filed a claim against the petitioners, under the circumstances described in a companion petition for a writ of certiorari which is being filed simultaneously herewith.

The petitioners contended in the Courts below that the conceded failure of Milcor and Blackburn to file, within sixty days after they had ceased to furnish materials and labor, a statement of their claim with the Commissioner of Public Works, as required by the laws and statutes of the State of Connecticut, was a complete bar to any

recovery against the petitioners upon the bond. To comprehend the full purport of their argument, the statutes under which the bond was executed must be briefly reviewed:

The surety company bond executed by McGraw as principal and the Aetna as surety was executed and delivered to the State of Connecticut on the 16th day of August, 1938 (R., 110-112). McGraw's contract with the State of Connecticut, specifically "made a part of this bond as though herein fully set forth" (R., 111-112) provided that: "Each and every provision of law and clause required by law to be inserted in this contract shall be deemed to be inserted herein and the contract shall be read and enforced as though it were included herein * * *" (R., 132). Wholly apart from that provision, it is conceded that the surety bond upon which Blackburn and Milcor have based their claims is governed by the Connecticut statutes requiring its issuance (*New Britain Lumber Co.* v. *American Surety Co.*, 113 Conn. 1).

Two statutes, existing side by side, dealt with surety company bonds furnished upon public construction contracts in 1938: the first, being Section 1594c of the 1935 Supplement to the General Statutes of Connecticut,* and

*"Sec. 1594c. *Bonds for protection of employees and material men on public structures.* Any officer or agent, * * * contracting in behalf of the state or any subdivision thereof for the construction, alteration, removal or repair of any public building, public road, public sewer or public bridge, if such contract shall exceed the sum of five hundred dollars, shall require from each contractor, as a condition precedent to the execution of a contract for any such construction, alteration, removal or repair, a bond with sufficient surety *and satisfactory to such officer or agent so contracting;* which bond shall be conditioned for the faithful execution of the contract according to its provisions and for the payment for all materials and labor used or employed in the execution of such contract. Any person, firm or corporation having any claim for materials and labor used or employed in the execution of such contract shall file, with the officers or agents contracting for any such construction, alteration, removal or repair, a statement of such claim within sixty days after he shall have ceased to furnish such materials or labor, which claim, if correct, shall be paid by such officers or agents, who shall recover the amount thereof with costs from the surety on such bond. The liability of the state or any subdivision thereof shall not exceed in the whole the amount it agreed to pay such contractor. If the total amount of such claims shall exceed such contract price, all such claims shall be paid pro rata."

the second being Section 540d(r) of the 1937 Supplement to the General Statutes.** Section 1594c, part of the Connecticut Law since 1917 (Chap. 118, Public Acts, 1917), is entitled: Bonds for protection of employees and material men on public structures." It provides in brief that: "*Any officer or agent* contracting in behalf of the state or any subdivision thereof for the *construction*, alteration, removal or repair of *any public building*, public road, public sewer or public bridge," shall require a surety company bond from each contractor, "which bond shall be conditioned for the faithful execution of the contract according to its provisions and for the payment of all materials and labor used or employed in the execution of such a contract." It further provides that "any person, firm or corporation having *any claim* for materials and labor used or employed in the execution of such contract shall file, *with the officers or agents contracting for any such construction*, alteration, removal or repair, *a statement of such claim within sixty days after he shall*

** Section 540d(r), 1937 Supp., General Statutes, thereafter designated as Section 786e(r), Chapt. 119a, 1939 Supp., General Statutes:

"Sureties for contracts. The bidder awarded the contract shall within ten days after the award thereof, substitute for the check accompanying his bid a surety performance bond for not less than fifty per cent nor more than one hundred per cent of the contract price, as shall have been prescribed by the commissioner in his invitation for bids, and an additional bond in the sum of not less than fifty per cent nor more than one hundred per cent of the contract price, as shall have been prescribed by the commissioner in his invitation for bids, conditioned that the contractor will promptly pay for all materials furnished and labor supplied or performed in the prosecution of the work, whether or not the material or labor enters into it and becomes a component part of the real asset. Such additional bond shall be held by the commissioner of public works for the use of each party who, whether as subcontractor or otherwise, shall have furnished material or supplies or performed labor in the prosecution of the work, as herein provided, and who has not been paid therefor. Such additional bond shall provide specifically that any such party may bring a suit thereon in the name of the state, prosecute the same to final judgment and have execution thereon for such sum or sums as may be justly due, provided the state shall not be liable to furnish counsel nor for the payment of any costs or expenses of any such suit. Each surety bond required by this subsection shall have as surety a surety company authorized to transact business in this state."

have ceased to furnish such materials or labor, which claim, if correct, shall be paid by such officers or agents, who shall recover the amount thereof, with costs from the surety on such bond".

Section 540d(r) of the 1937 Supplement to the General Statutes, thereafter designated as Section 786e(r), Chapter 119a, 1939 Supplement to the General Statutes, provides for a surety company bond, to be furnished to the Commissioner of Public Works, "conditioned that the contractor will promptly pay for all materials furnished and labor supplied or performed in the prosecution of the work, whether or not the material or labor enters into it and becomes a component part of the real asset." The bond shall be held by the Commissioner of Public Works "for the use of each party who, whether as sub-contractor or otherwise, shall have furnished material or supplies, or performed labor in the prosecution of the work as herein provided, and who has not been paid therefor". No specific reference, in so many words, is made to the necessity of serving a statement of claim by the party seeking to enforce the provisions of the bond.

The petitioners contended, in the Courts below, that the surety company bond prescribed by Section 786e(r), was governed by the broad and all-inclusive provisions of Section 1594c; that Milcor and Blackburn were required, as a condition precedent to their prosecution of a claim upon the bond, to file with the Commissioner of Public Works a statement of their claim *within sixty days* after they had ceased to furnish materials to the Newtown project; and that their conceded failure to do so was fatal to the claims which they asserted herein. In overruling the petitioners' contentions and striking out their affirmative defenses, the District Court held that a materialman was *not* required, under Section 1594c, to file a notice of claim within sixty days because "the sixty day

notice is *not* a condition precedent to suit against the obligors on a bond given under Section 1594c" (R., 83). The District Court also ruled that, in any event, Section 786e(r) "operates as *an implied repeal* of the 1935 act" (R., 85), and that the later statute prescribed a bond *without any limitation or restriction whatsoever,* so far as the service of a notice was concerned.

The Circuit Court of Appeals disagreed with the Trial Court's conclusion that the filing of a sixty day notice was not a condition precedent to a suit by a materialman against the principal and surety upon a bond furnished under Section 1594c (149 Fed. (2d) 301, 303-304). It held, nevertheless, that Section 1594c was impliedly repealed by Section 540d(r), in so far as contracts with the Department of Public Works was concerned (149 Fed. (2) at 303-304). It therefore affirmed the judgments entered by the Trial Court against the petitioners in favor of Milcor and Blackburn.

The Issue Presented by This Petition

The within petition squarely presents the following issue:

(1) Since the bond required by Section 540d does not mention, in so many words, the sixty day notice specified by Section 1594c, does the latter apply to a bond furnished to the Department of Public Works under Section 540d? Must a materialman or laborer, before he can invoke the provisions of such a bond, file the sixty day notice required by Section 1594c?

To comprehend the full purport of these queries, it is imperative to observe that the contrary contention sustained by the Courts below would permit a laborer or materialman under a contract with the Department of Public Works to file his claim at any time *within seven-*

teen years, since the bond, an instrument under seal, would be governed by the General Statute of Limitations covering such instruments (1930 Gen. Stat., Section 6003). In short, any surety company furnishing a bond for the construction of a public project under the jurisdiction of the Department of Public Works would be subjected to a liability thereon for seventeen years, requiring it to set aside reserves for that extraordinary period of time and making it impossible to close a public works job, although the work had been completed, accepted and used for many years.

The following unique situation would exist: All materialmen and laborers on private contracts would be required to file their claims within sixty days. Similarly, all materialmen and laborers on public jobs, other than those with the Department of Public Works, such as jobs for the State Highway Commission, the Airport Commission, the various Bridge Commissions, and every town, municipality and county within the state, would likewise be required to file their claims within sixty days. Set aside from those, *for no conceivable reason suggested by the Courts below,* would be the laborers and materialmen on contracts under the jurisdiction of the Department of Public Works, who would not be required to file any statement whatsoever and who would possess seventeen years within which to assert their claim, thereby affording neither the state, the surety company, nor the contractor any conceivable means of ascertaining outstanding and unpaid claims before they could close the job and release the surety from its obligation.

Reasons for the Allowance of the Writ

(1) The question presented by this petition is of immense importance to surety companies in the State of Connecticut, with respect to surety bonds written by them

under construction contracts with the Department of Public Works from 1937 to 1941. Under the decisions of the Courts below, surety companies will remain continuously liable for a period of seventeen years upon all bonds written between 1937 and 1941, without any conceivable way by which they can ascertain, prior to the expiration of the seventeen years, the full extent of their maximum liability. Each surety company will, therefore, be compelled to maintain reserves for the full amount of all their bonds written during those years throughout the entire period of seventeen years.

This consequence is supposedly due to the intention on the part of the Legislature to abrogate the necessity of any notice whatsoever when it enacted Section 786e(r) in 1937, covering the Department of Public Works, thereby differentiating between materialmen and laborers on public contracts with that Department and materialmen and laborers on all other public and private contracts who were, and always have been, required to file their claims within sixty days. No conceivable reason for the claimed differentiation has been suggested by the opinions of the District Court or the Circuit Court of Appeals. No rationale has been advanced to justify the Legislature's alleged intention of granting to materialmen and laborers on public jobs for the Department of Public Works seventeen years within which to assert their claims as against the sixty days prescribed for all other public and private projects.

We are aware of no other State or Federal statute which accords so unlimited a right to materialmen and laborers against sureties on public works bonds as the right which the Courts below have read into the Connecticut acts. The extraordinary nature of the conclusion adopted by the Courts below, resulting in the unexplained differentiation between one group of public works materi-

almen and laborers and all other groups of materialmen and laborers, public and private, within the same State, as well as the almost unlimited nature of the obligation imposed by the decisions of the Courts below upon principals and sureties, warrants a review of the Circuit Court's decision to determine whether, in fact, it has correctly determined and applied the law of the State of Connecticut.

Jurisdiction of the Court

This application is made under Section 240 of the Judicial Code (28 U.S.C.A. §347).

WHEREFORE, Petitioners respectfully pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case numbered on its docket 147, and that said decree of the United States Circuit Court of Appeals for the Second Circuit, affirming the judgments obtained by the Milcor Steel Co. and John T. D. Blackburn, Inc., against the Petitioners, be reversed by this Honorable Court, and that Petitioners have such other and further relief in the premises as to this Honorable Court may seem just.

Dated, August 16th, 1945.

F. H. MCGRAW & COMPANY, INC., and
THE AETNA CASUALTY & SURETY COMPANY,
By JOSEPH LOTTERMAN and
LOUIS A. TEPPER,
Counsel.

BRIEF IN SUPPORT OF THE FOREGOING PETITION

POINT I

The Courts below erred in ruling that Milcor and Blackburn were not required to plead and prove that they had filed a statement of their claims within sixty days after they had ceased to furnish materials to the Newtown project, as a condition precedent to a suit against McGraw and Aetna upon the surety bond involved herein. Under *Erie Railway Co.* v. *Tompkins*, 304 U. S. 64, the Courts below were required to apply the rule of law formulated by the decisions of the Connecticut court of last resort, to wit, that the absence of such an allegation was fatal to the respondents' claims upon the bond.

A

The initial statute for the protection of laborers and materialmen, in the form of a Mechanic's Lien Law for private construction, was enacted by the State of Connecticut in 1836. (*Barlow Bros. Co.* v. *Gaffney*, 76 Conn. 107, 109.) In 1855 there was first enacted, as a part of the Mechanic's Lien Law, a provision which required a laborer or materialman to file, with the owner of the building, a notice of his claim within sixty days after the labor had been performed, or the materials had been furnished. (*Barlow Bros. Co.* v. *Gaffney, supra*, at p. 110.) That sixty day provision has remained an integral part of the Connecticut law governing the enforceability of mechanic's liens down to this very day. (Title 53, Chapter 274, Section 5107, Gen. Stat. 1930.)

In common with the courts of other states, the Connecticut courts had ruled, at a very early date, that a mechanic's lien could not attach to, or be enforced against, the public property of a state, county, or municipality. (*National Fireproofing Co.* v. *Huntington,* 81 Conn. 632; *Pelton & King* v. *The Town of Bethlehem,* 109 Conn. 547.) The existence of that doctrine created a manifold injustice, since it deprived laborers and materialmen upon public works of any protection whatsoever. In the language of Connecticut's Supreme Court in *Pelton & King* v. *The Town of Bethlehem,* 109 Conn. 547, 552:

> "Therefore laborers and materialmen upon public buildings and works were relegated to recovery from the contractors alone, and exposed to a like difficulty or impossibility of obtaining payment from him which inspired the enactment of mechanic's liens statutes, but were deprived of the means of obtaining security which was available, under those statutes, to those furnishing labor and materials in construction work for private owners."

To correct that injustice, and place laborers and materialmen on public and private contracts upon a substantially equal footing, Connecticut, as well as other states, enacted statutes which required the execution and delivery of a surety company bond by a contractor who undertook the construction of a public work, the bond constituting the source of the protection which the real property provided to those covered by the mechanic's lien statutes (*Pelton & King* v. *The Town of Bethlehem,* 109 Conn. 547). Evidencing the legislative intent to accord laborers and materialmen upon public and private contracts an *identical* measure of protection, the initial statute directing the execution of a surety company bond upon public works, adopted in 1917, was enacted *as a part of*

the Mechanic's Lien statute. (See Title 53, Chapter 274, Section 5109, Gen. Stat. 1930.) Under the revision of the General Statutes in 1930, Chapter 274 of Title 53, entitled "Mortgages and Liens", contained Section 5106, providing for the filing of a mechanic's lien within sixty days after the labor had been performed or the materials had been furnished, Section 5107, providing for the service of a notice of claim upon the owner within that period of 60 days and Section 5109, providing for the filing of a claim upon a surety bond issued for a public construction *within sixty days after the labor had been performed, or the materials had been furnished.* In 1935, Section 5109 became Section 1594c, still *as a part of* Title 53, Chapter 274, under the heading of "Mortgages and Liens".

For a period of twenty years, *i.e.*, from 1917, the date of the original act, to 1937, the date of the enactment of Section 540d creating a Department of Public Works in the State of Connecticut, *it is undisputed that all public and private construction work in the State of Connecticut had been placed upon an identical basis.* During that period of time, laborers and materialmen upon public and private work were accorded exactly the *same* measure of protection; in the case of private work, a lien upon the real property, *if the notice of claim were served upon the owner within sixty days;* and, in the case of public property, a claim upon the surety company bond, *if the notice of claim were similarly served upon the officer requiring the bond within the same sixty day period.*

The legal consequences of the failure to act within the specified sixty days were precisely the same. If a laborer or materialman upon a private project failed to serve his notice of claim within the sixty day period, his *right to a lien was lost* (*Burritt Company* v. *Negry,* 81 Conn. 502, 505). So, too, in the case of a laborer or materialman upon a public project, the right to enforce

the bond *was likewise lost,* if he failed to file his statement of claim with the officer to whom the bond had been delivered within the sixty days prescribed by the statute.

In its opinion, the Trial Court ruled that a materialman's right to recover upon a surety company bond, under Section 1594c, was not conditioned upon the service of a notice of claim. The Court declared "that sixty days notice is not a condition precedent to suit upon the obligors of a bond under Section 1594c", and that, therefore, "it follows that the plaintiff's first ground of motion is without merit" (R., 83).

The District Court's conclusion, as the first ground for its decision, was so completely in conflict with the decision by Connecticut's highest Court in *New Britain Lumber Co.* v. *American Surety Co.,* 113 Conn. 1, 154 A. 147, that it was rejected by the Circuit Court with the following comment:

> "This conclusion appears foreclosed, however, by New Britain Lumber Co. *v.* American Surety Co. of New York, 113 Conn. 1, 154 A. 147, which held squarely that a complaint seeking recovery against the surety upon a bond given to a town under this statute must be dismissed for lack of allegation by the materialman that it had filed its claim within the sixty-day period." (149 Fed. [2d] 301, 303.)

B

We now turn to a consideration of the situation which obtained in 1937, when the Connecticut Legislature enacted a statute creating a Department of Public Works, Section 540d, 1937 Supp. to Gen. Stat., thereafter known as Section 786e, 1939 Supp. to Gen. Stat. Subdivision r of that section provided for the delivery of a surety company bond in connection with the execution of contracts under the jurisdiction of the Department of Public Works.

The petitioners contended in the Trial Court that the bonds required by Section 786e (r) were subject to the provisions of the more inclusive and all-embracing provisions of Section 1594c which, by its terms, applied to the construction "of *any public building*" in the State of Connecticut and, more particularly, were subject to those provisions of Section 1594c which require the service of a statement of claim within the prescribed sixty day period. Upon this phase of the petitioners' argument, the Trial Court declared as the second ground of decision, that "Section 786e operates as an implied repeal of the 1935 Act," (fol. 254) and that, as a result, no notice of any kind was required of materialmen or laborers under the later statute. It was this second ground which was approved and adopted by the Circuit Court.

In the formulation of that ruling the Courts below overlooked the significance of a decision by Connecticut's court of last resort, to wit, *Conn. Rural Roads Improvement Ass'n* v. *Hurley,* 124 Conn. 20. In that case, the Supreme Court of Connecticut ruled that Section 540d, which created the Department of Public Works, the very statute involved in the instant case, did not abolish or in any way affect other existing departments dealing with public structures, such as the State Highway Department, the Merritt Highway Commission, the Hartford and East Hartford Bridge Commission, the Airport Commission, the Commission on Sculpture, the Commission exercising jurisdiction over the State Dock at Guilford, the Board and Harbor Commissioners of New Haven Harbor, the Soldiers' Home Commission, and various other State Commissions dealing with public buildings.

It is plain, therefore, that the enactment of Section 540d did not, directly or by implication, repeal many of the existing statutes which dealt with public works. More specifically, Section 1594c was not, and could not be,

affected thereby. For example, the jurisdiction of the State Highway Commission was unimpaired, as the Court specifically ruled in *Conn. Rural Roads Improvement Ass'n* v. *Hurley, supra.* Since Section 529c of the State Highway Commission Act required the State Highway Commissioner, in contracting on behalf of the State, to obtain from the contractor a bond *"conditioned as provided in Section 1594c"*, it is obvious that the 1935 statute could not possibly have been repealed by the later act. Similarly, Section 1594c would also control all of the public works which, according to the Connecticut Supreme Court in the *Hurley* case, *supra,* were completely unaffected by the statute creating the Department of Public Works.

C

At the January 1941 session of the Connecticut Legislature, *both Section 1594c and Subdivision (r) of Section 786e were repealed,* the first by Section 697f of the General Statutes, 1941 Supp. and the second by Section 370f of the General Statutes, 1941 Supp. Had Section 1594c been impliedly repealed by Section 786e when the latter was originally enacted, as the Trial Court ruled below, there would have been no necessity for the specific repealer in 1941. The most conclusive and significant of the Legislature's activities in 1941, however, *was its substantial re-enactment, upon the repeal of both prior sections, of Section 1594c, as Sections 694f and 695f* of the 1941 Supp. to the General Statutes.* Those sections, appended

* *Section 694f: Bonds for protection of employees and material men on public structures.*

Before any contract exceeding one thousand dollars in amount for the construction, alteration or repair of any public building or public work of the state or of any subdivisions thereof is awarded to any person, such person shall furnish to the state or such subdivision a bond in the amount of the contract which shall be binding upon the award of the contract to such person, with a surety or sureties satisfactory to the officer awarding the contract, for the protection of persons supplying labor or materials in the prosecution of the work provided for in such contract for the use of each such person. Nothing

at length in the footnote hereto, were reenacted as a part of Title 53, Chapter 274, of the Connecticut Statutes, under the heading "Mortgages and Liens", *the identical title, chapter and heading containing Section 1594c and its predecessor statutes from the date of its original enactment in 1917.*

The new sections bear the same caption as 1594c and its predecessors, to wit, **"Bonds for protection of employees and material men on public structures"**. They contain exactly the same phraseology as Section 1594c in its applicability to "the construction • • • of *any* public building" in the State of Connecticut. In only two respects does the new statute differ from its predecessor, both of which have been borrowed from Section 786e(r): firstly, it applies to all contracts for public

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in sections 694f to 696f, inclusive, shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to the bond therein referred to.

Section 695f: Suit on bond; when and how brought.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under the provisions of section 694f and who has not been paid in full therefor before the expiration of a period of sixty days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing such payment bond shall have a right of action upon such payment bond upon giving written notice to such contractor within sixty days from the date on which such person performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or at his residence.

(b) Every suit instituted under this section shall be brought in the name of the person suing, in the superior court for the county where the contract was to be performed, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract.

(c) The word "material" as used in sections 694f to 696f, inclusive, shall be construed to include the rental of equipment used in the prosecution of work provided for in such contract.

construction involving more than $1,000 and secondly, it permits a direct suit against the surety upon the bond, without even the necessity of bringing the action in the name of the state. *The identical sixty day provision contained in Section 1594c, however, was reenacted, expressly applicable to every contract for the construction of a public work in the State of Connecticut* and requiring the service of a notice upon the contractor, instead of the state, within the prescribed period of time.

The action of the Connecticut Legislature in 1941, of vital importance in illuminating the intent of the Legislature at the time of its enactment of the two prior statutes (*Connecticut Rural Roads Improvement Ass'n* v. *Hurley*, 124 Conn. 20, 34), is a striking confirmation of the validity of the views presented by the petitioners in the Courts below.

Under the decision of the Courts below, the following situation would exist: From 1917 to 1937, materialmen and laborers upon all public and private contracts were subject to the same sixty day condition precedent to the enforcement of their claim. From 1941 to date, precisely the same condition is true. From 1937 to 1941, however, according to the Court below, the Legislature had deliberately created a disparity for which no reason is suggested, a disparity which subjected materialmen and laborers on private contracts and public contracts, other than those executed by the Department of Public Works, to a sixty day condition, whereas materialmen and laborers of contractors with the Department of Public Works possessed seventeen years within which to assert a claim. That result is predicated upon the alleged inconsistencies and repugnancies between the two prior statutes, the supposed existence of which was effectively demolished by the Legislature in its enactment of a statute in 1941 which is, in effect, a substantial reenactment of Section 1594c, as well as a combination of both.

D

It is a fundamental principle in the construction of statutes that the Legislature, in the enactment of a statute, was fully cognizant of existing acts upon the subject and did not intend the repeal of the earlier by the later, where no specific repealing clause was adopted. "It is a legal presumption that the Legislature in framing the charter, was well aware of the existing provisions of the statute, and a further presumption that there was no intention to enact conflicting provisions * * *". (*State ex rel. Pape* v. *Dunais*, 120 Conn. 562, 566.) "The presumption is that the Legislature, in enacting that law, did it in view of existing relevant statutes, *and intended it to be read with them, so as to make one consistent body of law.*" (*Hartley* v. *Vitiello*, 113 Conn. 74, 82.)

Equally well established is the canon of construction, repeatedly reiterated and applied, that a repeal by implication is never favored and will be avoided, whenever possible. "Repeals by implication are not favored and will *never* be presumed where the old and new statute may well stand together". (*State ex rel. Wallen* v. *Hatch*, 82 Conn. 122, 125). It is the duty of a Court to coordinate and harmonize statutory provisions which appear to be in conflict and to adopt a construction which will validate, rather than invalidate, the legislation subject to review. So, too, the courts will never invoke a mode of construction which entails absurd and unreasonable consequences, where a perfectly reasonable interpretation may be accorded to the statutes involved, conforming in every way with the remedial purposes to be effectuated. "When one construction leads to public mischief which another construction will avoid, the latter is to be favored unless the terms of the statute absolutely forbid." (*Bridgeman* v. *City of Derby*, 104 Conn. 1, 8.) "It is

to be noted that the Act appended in the footnote repeals a number of statutory provisions, but does not expressly repeal Section 5425, *nor does it contain any general repealing clause.* There is no repugnancy between the statutes; and we think there is no repeal by implication. Such repeals are not favored, and when an earlier and later statute can be reconciled, *it is the duty of the Court to so construe them that the latter may not operate as a repeal of the former.*" (*Costa* v. *Reed,* 113 Conn. 377, 385, citing many cases.)

That the two statutes involved in the instant case may be reconciled and read together was established by the case of *Southern Surety Co.* v. *Standard Slag Co.,* 117 Ohio St. 512, 159 N. E. 559, a case on all fours with the instant one. The Circuit Court, in its opinion, refused to follow the process of reconciliation adopted in the aforementioned case. On the contrary, it imputed to the Legislature an intent for which no foundation, support, justification or rationale can be ascribed, an intent to create artificial differentiations and a manifestly absurd liability, all in contravention of well-established Connecticut principles of statutory interpretation. Its conclusion is allegedly justified by the literal sense and precise letter of the statutory language, notwithstanding the injunction of the Connecticut Courts that:

> "The intent of the lawmakers is the soul of the statute, and the search for this intent we have held to be the guiding star of this court. *It must prevail over the literal sense and the precise letter of the language of the statute.*" (*Bridgeman* v. *City of Derby,* 104 Conn. 1, 8.)

CONCLUSION

The Writ of Certiorari should be granted as prayed for.

Dated, August 16th, 1945.

Respectfully submitted,

JOSEPH LOTTERMAN and
LOUIS A. TEPPER,
Counsel for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 348.

F. H. McGRAW & COMPANY INC. and THE AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

vs.

MILCOR STEEL COMPANY.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1945.

F. H. McGRAW & COMPANY INC. and THE AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

against

MILCOR STEEL COMPANY.

No. 348.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Milcor Steel Company, by counsel, files its brief in opposition to petition for writ of certiorari herein as follows:

Statement as to Petitioners' Failure to Comply With Requirements of Rule 38.

In the District Court one judgment was entered, which awarded Milcor Steel Company (herein referred to as Milcor) the amount of its claim, with interest and costs, and which awarded another claimant, John T. D. Blackburn Inc. (Blackburn), the amount of its claim, with interest and costs (R. 619-620). From this, each of F. H. McGraw & Company Inc. (McGraw) and The Aetna Casualty and Surety Company (Aetna) appealed to the Circuit Court of Appeals, the matter and record there appearing as Civil Action File No. 368, and the Order for Mandate of that

Court (R. 670) decreed that "the judgment of said District Court be and it hereby is affirmed with costs." Two petitions for writ of certiorari have been filed here, the instant one (No. 348) by both Aetna and McGraw, seeking to obtain a review of the decree of the Circuit Court of Appeals in favor of Milcor *alone* (p. 1 of petition), but praying for relief (p. 9 of petition) that the decree of the Circuit Court of Appeals affirming the judgments obtained by *both* Milcor and Blackburn against the petitioners, be reversed; and the other (No. 347) seeking to obtain a review of the decree of the Circuit Court of Appeals in favor of Blackburn (p. 1 of that petition) and praying for relief (p. 12 of that petition) that the decree of the Circuit Court of Appeals affirming the judgment obtained by Blackburn alone against the petitioners, be reversed. Petitioners have improperly brought two separate petitions (in each of which *both* have joined) for writs of certiorari from this one judgment. While each petitioner might petition as a separate party, nevertheless, here *both* have joined in *each* petition. Nor, we submit, is this proper practice under Rule 48 of this Court, in that the purpose of that rule is to encourage consolidation of appeals and accordingly reduce the volume of papers to be presented to this Court for consideration, rather than to permit of an expansion of those papers, as has been done here. Petitioners' obvious purpose is to permit each of them to make two separate statements of facts and present two separate briefs, whereas the obvious purpose of Rule 48 is to encourage litigants to merge their statements and briefs which otherwise they might have presented separately. We respectfully submit that the procedure adopted here particularly violates the provisions of subdivision 2 of Rule 38 of this Court and that the petition at No. 348 should be denied by virtue of that fact and of the authorities therein set forth.

Counter Statement of the Matter Involved and of the Issue Presented.

We present this counter statement because petitioners' Summary Statement fails to present certain salient facts, and is argumentative rather than expository, as is the Statement of the Issue presented in the petition.

In August, 1938, petitioner McGraw was awarded a contract for the general construction of a portion of a State Hospital (R. 599) by the Department of Public Works of the State of Connecticut. McGraw, as principal and Aetna, as surety, filed a bond at that time to insure payment to materialmen, laborers and subcontractors on the job. McGraw awarded a subcontract for the plastering work to Sherman Plastering Company Inc. (Sherman) (R. 600), which company thereafter purchased various materials for its work from Milcor (R. 602) and those materials were used by Sherman on the job in question. Milcor is unpaid for those materials to the extent of a principal balance of $6,372.51. The Trial Court so found (R. 602, 617) and these essential facts have not been questioned or denied by petitioners in their petition or in their briefs in the Circuit Court of Appeals.

Milcor delivered its materials to the job between August 30, 1939 and October 17, 1939 (R. 558). On September 14, 1939 it notified McGraw by letter (R. 560) that it was about to supply material to Sherman for the job. On October 12, 1939 it notified McGraw by letter (R. 561) that during August and September it had delivered $5,419.26 worth of materials to the job. On January 18, 1940 it wrote McGraw (R. 564) sending a statement of account for $6,372.51 for completed deliveries to the job.

The bond in suit was written pursuant to the requirements of 540d(r) of the 1937 Supplement to the General

Statutes of Connecticut (printed in Appendix B) which required, on all contracts entered into by the Commissioner of Public Works, a payment bond of the general contractor and a surety for the protection of materialmen, laborers and subcontractors. The statute contained no short period of limitations, and did not require as a condition of suit the giving of any notice to the surety, to the contractor, or to the public authority, of a claim for unpaid materials or labor. Also in effect at that time was Sec. 1594c to the General Statutes of Connecticut, 1935 Supplement (printed in Appendix A) which, as will be developed later, was not applicable to contracts awarded by the Department of Public Works, but was applicable to county works, municipal works, etc. That statute likewise contained no short period of limitations, but did contain a condition to suit that notice of unpaid claims of materialmen or laborers be given *to the public authority* controlling the work within sixty days of the last delivery of material or performance of labor.

A recital of previous proceedings is not necessary to this discussion. Suffice it to say that petitioners' contention that the sixty day notice provision contained in Section 1594c should be read into 540d(r) was overruled by the District Court (R. 81-89) and by the Circuit Court of Appeals (R. 635-639) on the ground that Sec. 540d, completely covering the subject matter with which it was concerned, was exclusive of and brought about an implied repeal of, or was at least a substitute for or exception to Sec. 1594c, rather than a supplement thereto.

The only issues presented by this petition are (1) whether the question of local law thus raised is an important one, and (2) if so, whether the Circuit Court of Appeals has decided that question in a way probably in conflict with applicable local decisions.

Summary of Argument.

The petition should be denied because:

1. The Circuit Court of Appeals properly applied the law of Connecticut to the situation presented.

2. The petition presents no question of importance, the statute under discussion having been long since repealed; the question presented concerns only the parties.

ARGUMENT.

I.

The Circuit Court of Appeals Properly Applied the Law of Connecticut to the Situation Presented.

Section 540d was passed by the Legislature as a part of a broad scheme of reorganization of state works and services, one of the results of which was the creation of a Department of Public Works, which was given exclusive jurisdiction over a particular field and for which a complete administrative and procedural set-up was created by that statute. It was the intention of the Legislature to create various self-sufficient departments, including the Department of Public Works, to give power to those departments, and to leave to the previously existing laws, including Sec. 1594c, such subject matter as was not so covered.

By Special Act No. 242 of 1935, the Connecticut Legislature created a commission upon the reorganization of the departments of the State Government. That commission was charged to

> "* * * study all the functions of the State Government, ascertain * * * all duplications of service

> and effort, determine the most economical method of furnishing the present state service and recommend the abandonment, modification or consolidation of any existing departments and the creation of such new departments as may be required for the most economical operation of the State Government. * * *"

and was required to render a report to the Governor and to

> "* * * include with its recommendations drafts of proposed legislation necessary to carry out such recommendations."

The Commission enlisted the aid of various experts and rendered a lengthy and careful report to the Governor, entitled "Report of the Connecticut Commission Concerning the Reorganization of the State Departments." Its contents are a valuable and legitimate aid in ascertaining the intention of the Legislature in passing Sec. 540d. *Connecticut Rural Roads Improvement Ass'n.* vs. *Hurley,* 124 Conn. 20, 197 Atl. 90.

The report (Ch. XVIII) gives a survey of the then present organization and administration of public works, which was loosely scattered throughout sundry different bureaus, and sets forth the commission's proposal that a Department of Public Works be created and made responsible for preparing or for having prepared all plans, specifications, and estimates, *for the letting of all contracts,* and for the supervision of the execution of contracts covering the construction, remodeling and repairing of any state building involving an expenditure in excess of $1,000. The Commission considered the problem of public works as a whole, recognized the confusion and economic waste then existent due to lack of centralized authority and responsibility in respect of such works, and determined the

necessity for creation of a single self-sufficient and authoritative department to handle such matters.

To give effect to its reports, the Commission prepared proposed legislation, which was adopted by the Legislature in Sections 1 to 24 of Chapter 126 of Public Acts of 1937, which became section 540d, subsections (a) to (x) in the compilation of the 1937 Supplement. Section 18 of the Commission's proposed bill was adopted, without change, and became and is Section 540d(r), under which the bond in suit was written.

After the enactment of Section 540d, Section 1594c still remained in force, to be effective in those situations not covered by Section 540d, or by other portions of the reorganization act, for example, county and municipal works.

Petitioners' whole effort is directed to the proposition that one clause of Section 1594c should be carried over and read into Section 540d, an unrealistic position when consideration is given to the complete study of the Commission, its voluminous and careful report, and the fact that Section 540d set up an entirely new department, provided it with subject matter of jurisdiction and procedure, and, most important, created a complete scheme for protection of materialmen and laborers far more extensive than the scheme of Section 1594c. The following material differences between the bonding provisions of the two acts show clearly the intention of the Legislature that Section 540d was not merely an addenda to 1594c, but was a complete and new scheme:

a. Authority in charge—under 1594c, any state, county or municipal authority; under 540d, Commissioner of Public Works only.

b. Contracts to which applicable—under 1594c, any contract over $500; under 540d, any contract over $1,000.

c. Number of bonds required—under 1594c, one bond to cover both completion and payment; under 540d, two separate bonds, one for completion and one for payment.

d. Amount of bond—under 1594c, entirely in discretion of public authority; under 540d, each bond for no less than 50% and no more than 100% of contract price.

e. Condition of bond—under 1594c, faithful execution of contract and payment for all materials and labor used or employed in the execution of such contract; under 540d, payment for all materials and labor whether or not the same enters into and becomes a component part of the real asset.

f. Notices of claim necessary—under 1594c, within sixty days of last delivery; under 540d, none.

g. To whom notice given—under 1594c, public official in charge; under 540d, none required.

h. Amount of fund available to materialmen and laborers—under 1594c, limited to contract price less payments already made to contractor; under 540d, balance due to general contractor plus full amount of payment bond.

i. Method of recovery by unpaid materialmen or laborers—under 1594c, procure pro rata share directly from public authority which in turn sues surety; under 540d, sue directly on payment bond.

While the exact question presented has never before been passed on by the Connecticut Courts, nevertheless, the question of statutory construction involved has been correctly determined by the District Court and the Circuit Court of Appeals in following the rule announced by the Supreme Court of Errors of Connecticut to the effect that

> "If one of two enactments is special and particular and clearly includes the matter in controversy,

> whilst the other is general and would, if standing alone, include it also, and if the inclusion of that matter in the general enactment would produce a conflict between it and the special provisions, it must be taken that the latter was designed as an exception to the general provisions." Wentworth *vs.* L. & L. Dining Co. Inc. (Sup. Ct. of Errors, Conn. 1933), 116 Conn. 364, 165 Atl. 203.

Petitioners cite no cases to sustain their position that the Circuit Court of Appeals has probably wrongly applied the law of Connecticut. Much stress is laid by them upon one of the grounds of decision of the District Court which they believe to be contrary to the rule of law expressed in *New Britain Lumber Co.* vs. *American Surety Company of New York*, 113 Conn. 1, 154 Atl. 147. However, in the Circuit Court of Appeals, Milcor placed no reliance upon that particular ground and the Circuit Court of Appeals likewise passed it by, so petitioners can have no complaint on that score. The only attempt made in the petition to show that the Circuit Court of Appeals probably wrongly applied the Connecticut law to the major point of importance is by the citation of an Ohio case, *Southern Surety Company* vs. *Standard Slag Co.*, 117 Ohio St. 512, 159 N. E. 559, which, while somewhat alike to the situation presented here, is not a determination as to what Connecticut courts would rule in the present situation.

Petitioners rely on a 1941 statute (Appendix C) passed by each branch of the Legislature and signed by the Governor *after* the decision of the District Court herein, as an indication that the Legislature intended Section 540d to contain a sixty day condition of notice, since, as they claim, the 1941 Act was a substantial reenactment of Section 1594c. But the 1941 Act was in no manner a substantial reenactment of Section 1594c. The 1941 Act differs mate-

rially from Section 1594c, inter alia, in the following respects; it does away with the absolute requirement of a performance bond; it permits of direct suit against the surety; it requires notice of claim within sixty days *only* when the claimant has no direct contractual relation to the prime contractor; it requires such notice to be given to the prime contractor rather than to the public authority; it does not limit the fund available for labor and material claims to the face amount of the contract; it covers rental of equipment used on the project; it provides a period of limitation of suit on the bond of one year from date of final settlement of the contract. The 1941 Act created a new and even broader scheme of protection for materialmen and laborers, and was, in fact, the adoption, word by word, of the so-called Miller Act, 40 U. S. C. A. Sec. 270a, *et seq.* Actually, the enactment of the 1941 statute contains a fair inference contrary to petitioners' position, namely, that the Legislature thereby recognized that Sec. 540d did not contain a condition of notice either in express words or by reference, and accordingly provided it in the 1941 Act. *MacKay* vs. *Commissioner of Internal Revenue* (C. C. A. 2d, 1938) 94 Fed. (2nd) 558; *Matter of Miller*, 110 N. Y. 216, 18 N. E. 139; *Silver* vs. *Silver* (Sup. Ct. of Errors, 1928), 108 Conn. 371, 143 Atl. 240.

Petitioners lay much stress upon the course of the history of protection afforded to materialmen and laborers, and conclude that since in many states such claimants are required to file claims within a sixty day period, that provision should be read into Sec. 540d, the language of which contains no such restriction. But petitioners overlook the fact that the legislative policy was obviously to benefit and protect the materialman and the laborer, not the compensated surety. A period of limitation is a matter of legis-

lative grace to the obligor, not of right, and does not exist unless specifically granted. As the Circuit Court of Appeals has well put it (R. 639):

> "Certainly materialmen scanning the 1937 enactment would not have thought of looking back to Sec. 1594c for conditions requiring speedy performance to insure recovery on the bond."

Petitioners, as we have pointed out in our statement of facts, received ample and prompt notice of Milcor's claim. Their only complaint is hypertechnical, *i.e.*, that those notices were addressed to them rather than to the Commissioner of Public Works. Since the then applicable statute, Sec. 540d, permits direct suit against the surety, it would be absurd to require notice to the public authority, as provided in Sec. 1594c, which statute required notice to the public authority simply because the unpaid materialman had to look to that source for his money, and could not sue the surety directly.

There was no error in the ruling of the courts below, and in any event not such a plain showing of error, as to move this Court to set aside that ruling. *Palmer* vs. *Hoffman*, 318 U. S. 109, 118, 87 L. Ed. 645, 652, rehearing denied 318 U. S. 800, 87 L. Ed. 1163.

II.

The Petition Presents No Question of Importance, the Statute Under Discussion Having Been Long Since Repealed; the Question Presented Concerns Only the Parties.

Petitioners seek review of an interpretation of a statute that was in effect from 1937 to 1941. The portion of the statute before the court deals with a minor procedural point in the carrying out of construction or repair con-

tracts originating in the Department of Public Works, *i.e.*, the mechanics of protection for materialmen and laborers. The statute was intended to benefit those persons, not to protect the compensated surety. No complaint is here made that the statute did not accomplish its purpose. The question involved can in no sense be viewed as one of public importance. As a matter of fact, the express repeal of Section 540d in 1941 by a new statute giving even broader protection to materialmen and laborers ended the controversy once and for all. The question sought to be raised here has ceased to exist, except as between the parties to this litigation. Petitioners have failed to call attention to one single instance where the same question exists. No weighty or significant interest attaches here to create a reason for granting certiorari under subdivision 5(b) of Rule 38 of this Court.

Conclusion.

The petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix A.

1935 Act.

General Statutes of Connecticut, 1935 Supplement, Sec. 1594c.

"*Bonds for protection of employees and material men on public structures.* Any officer or agent, * * * contracting in behalf of the state or any subdivision thereof for the construction, alteration, removal or repair of any public building, public road, public sewer or public bridge, if such contract shall exceed the sum of five hundred dollars, shall require from each contractor, as a condition precedent to the execution of a contract for any such construction, alteration, removal or repair, a bond with sufficient surety and satisfactory to such officer or agent so contracting; which bond shall be conditioned for the faithful execution of the contract according to its provisions and for the payment for all materials and labor used or employed in the execution of such contract. Any person, firm or corporation having any claim for materials and labor used or employed in the execution of such contract shall file, with the officers or agents contracting for any such construction, alteration, removal or repair, a statement of such claim within sixty days after he shall have ceased to furnish such materials or labor, which claim, if correct, shall be paid by such officers or agents, who shall recover the amount thereof with costs from the surety on such bond. The liability of the state or any subdivision thereof shall not exceed in the whole the amount it agreed to pay such contractor. If the total amount of such claims shall exceed such contract price, all such claims shall be paid pro rata."

Appendix B.

1937 Act.

General Statutes of Connecticut, 1937 Supplement, Sec. 540d(r).

"*Sureties for contracts.* The bidder awarded the contract shall, within ten days after the award thereof, substitute for the check accompanying his bid a surety performance bond for not less than fifty per cent nor more than one hundred per cent of the contract price, as shall have been prescribed by the commissioner in his invitation for bids, and an additional bond in a sum of not less than fifty per cent nor more than one hundred per cent of the contract price, as shall have been prescribed by the commissioner in his invitation for bids, conditioned that the contractor will promptly pay for all materials furnished and labor supplied or performed in the prosecution of the work, whether or not the material or labor enters into it and becomes a component part of the real asset. Such additional bond shall be held by the commissioner of public works for the use of each party who, whether as subcontractor or otherwise, shall have furnished material or supplies or performed labor in the prosecution of the work, as herein provided, and who has not been paid therefor. Such additional bond shall provide specifically that any such party may bring a suit thereon in the name of the state, prosecute the same to final judgment and have execution thereon for such sum or sums as may be justly due, provided the state shall not be liable to furnish counsel nor for the payment of any costs or expenses of any such suit. Each surety bond required by this subsection shall have as surety a surety company authorized to transact business in this state."

Appendix C.

1941 Act.

General Statutes of Connecticut, 1941 Supplement, Secs. 694f, 695f.

"Section 694f: *Bonds for protection of employees and material men on public structures.*

Before any contract exceeding one thousand dollars in amount for the construction, alteration or repair of any public building or public work of the state or of any subdivisions thereof is awarded to any person, such person shall furnish to the state or such subdivision a bond in the amount of the contract which shall be binding upon the award of the contract to such person, with a surety or sureties satisfactory to the officer awarding the contract, for the protection of persons supplying labor or materials in the prosecution of the work provided for in such contract for the use of each such person. Nothing in sections 694f to 696f, inclusive, shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to the bond herein referred to.

"Section 695f: *Suit on bond; when and how brought.*

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract in respect of which a payment bond is furnished under the provisions of section 694f and who has not been paid in full therefor before the expiration of a period of sixty days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute such action to final execution and judgment for the sum or sums justly due him; provided any person having direct contractual relationship with a subcontractor but

no contractual relationship express or implied with the contractor furnishing such payment bond shall have a right of action upon such payment bond upon giving written notice to such contractor within sixty days from the date on which such person performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business or at his residence.

(b) Every suit instituted under this section shall be brought in the name of the person suing, in the superior court for the county where the contract was to be performed, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract.

(c) The word "material" as used in sections 694f to 696f, inclusive, shall be construed to include the rental of equipment used in the prosecution of work provided for in such contract."